In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1426

VINCENT PACELLI, JR.
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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The petitioner, Vincent Pacelli, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 5, 1978.

OPINION BELOW

The opinion of the court below is reported at 588 F.2d 360. A copy of the court's opinion and its order denying rehearing are included in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 5, 1978. A timely petition for rehearing was denied on December 28, 1978. Jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the prosecution may convict a defendant when it simultaneously tries him on a related charge in violation of his rights against double jeopardy.

2. Whether as a condition of obtaining reversals of his convictions, a defendant whose trial on the charges was unconstitutionally joined with a charge barred by the double jeopardy clause must prove that the constitutional violation produced his convictions.

3. Whether it can be "harmless error" to join for trial a jeopardy-barred conspiracy charge with five substantive charges which were allegedly pursuant to the conspiracy, where the evidence concerning all of the substantive charges was virtually identical and the jury found defendant not guilty of three of those charges, guilty of two.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall *** be subject for the same offense to be twice put in jeopardy of life or limb; *** nor be deprived of life, liberty, or property, without due process of law; ***.

STATEMENT OF THE CASE

Petitioner, along with four other defendants, was tried in the Southern District of New York in December, 1973. The indictment charged petitioner with conspiring with thirteen named defendants to violate federal narcotics laws from January 1, 1971 to September 20, 1973. Petitioner was also charged with six substantive counts which alleged possession for distribution of cocaine and heroin at various times in 1971. Trial was by jury.

At the close of the Government's case, the trial judge acquitted petitioner on one substantive count (count 4). The jury found petitioner not guilty on all three substantive counts charging possession of cocaine (counts 3, 5 and 7) but convicted him on the conspiracy count (count 1) and the two remaining counts (counts 2 and 6).

Petitioner was sentenced to fifteen years in prison on each of the three counts upon which he had been convicted, the sentence to run concurrently but consecutive to a twenty-year sentence imposed upon petitioner in 1972, by the same trial judge, in the same district.

On appeal, petitioner argued, as he had in the District Court, that the conspiracy count was barred by the Fifth Amendment's prohibition against double jeopardy, being substantially the same offense for which he was earlier tried, convicted, and sentenced to twenty years imprisonment. The Court below agreed, and reversed the conspiracy conviction on double jeopardy grounds. It failed, however, to reverse the substantive

convictions. *United States v. Mallah,* 503 F.2d 971 (2d Cir. 1974), *cert. denied,* 420 U.S. 995 (1975).

Petitioner then sought a writ of certiorari in this Court complaining, *inter alia,* of the Second Circuit's failure to vacate his convictions on the substantive counts as part of the appropriate remedy for the double jeopardy violation. Question presented number 2, Petition for a Writ of Certiorari, *Pacelli v. United States,* No. 74-706, October Term, 1974. In his Brief in Opposition to the Petition, the Solicitor General contended that the "petitioner did not make this argument [below] and this Court need not consider it" (p. 12). This Court denied the petition. 420 U.S. 955 (1975) (Mr. Justice Douglas dissenting.)

Petitioner then stood trial on an unrelated federal charge, was convicted, and his conviction was affirmed. *United States v. Pacelli,* 521 F.2d 135 (2d Cir. 1975), *cert. denied,* 424 U.S. 911 (1976).

In November, 1977, petitioner returned to the district court and filed a motion under 28 U.S.C. §2255 to have his substantive convictions vacated on the ground that they were tainted by the simultaneous violation of his rights against double jeopardy. The district judge denied the petition on various grounds, including a determination that the issue could not be presented on a §2255 motion. The Second Circuit, in its decision upon which review is now sought, disagreed on the availability of §2255 but affirmed on the merits.

Petitioner contended below that it was inherently prejudicial to try him on the substantive charges while at the same time forcing him to defend against the conspiracy count, which, the court had held, was jeopardy-barred. He contended that the violation of his rights against double jeopardy:

1. caused his trial on the substantive counts to be joined

for trial with four co-defendants, such joinder not being permissible absent the conspiracy charge;

2. infected his trial on the substantive counts because the trial court, pursuant to *Pinkerton v. United States,* 328 U.S. 640 (1946), charged the jury that it could find him guilty of the substantive charges if it found that they were committed by a co-conspirator and that petitioner was a member of the conspiracy;

3. adversely affected and illegitimately burdened his defense of the substantive charges by saddling him simultaneously with the defense of the jeopardy-barred conspiracy charge;

4. created an unconstitutional risk that the jury would be influenced by the conspiracy charge in its determination of his guilt of the substantive charges;

5. caused evidence otherwise inadmissible against him to be admitted, or evidence which would otherwise not have been offered to be offered.

Petitioner also contended that the Government had the burden of proving beyond reasonable doubt, as required by *Chapman v. California,* 386 U.S. 18, 24 (1967), that such possibilities of prejudice did not exist; that petitioner would inevitably have been convicted without the constitutional violation.

The court below, while purporting to apply the *Chapman* standard, held that relief was unavailable because "there was *no showing* of prejudice" (4a); petitioner "was not *substantially* prejudiced" (15a) (emph. supp.). The possibility that the jury was influenced by the jeopardy-barred conspiracy charge was dismissed in reliance upon "the jury's discriminating acquittal of Pacelli on three . . . counts" (13a).

REASONS FOR GRANTING THE WRIT

1. *The decision below is grievously wrong and flouts this Court's unanimous decision in Price v. Georgia,* 398 *U.S.* 323 (1970).

In *Price v. Georgia,* 398 U.S. 323 (1970), a defendant who had been tried for murder but convicted only of manslaughter obtained a reversal of the manslaughter conviction. He was retried for murder, prohibited by *Green v. United States,* 355 U.S. 184 (1957). However, he was again convicted only of manslaughter. This Court, in a unanimous opinion by Chief Justice Burger, reversed the manslaughter conviction because it had been obtained in a trial in which Price's double jeopardy rights were violated, *i.e.,* trying him a second time for murder. This Court expressly declined to apply a harmless error analysis, holding instead:

> The Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly. Further, and perhaps of more importance, we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence. 398 U.S. at 331.

Price v. Georgia requires reversal here. The lower court attempted to distinguish it by noting that the jeopardy-barred charge there was a "greater offense" and thus may have produced a compromise verdict whereas the jeopardy-barred charge here was an "independent" offense (12a). Such a distinction is hollow. In the first place, there is no reason to assume that the jury knows or believes that conspiracy is not a "greater

offense" than the substantive charges. From all the attention paid to conspiracy in the charge, the jury might reasonably have inferred otherwise. In any event, it is altogether likely that once having determined that petitioner was guilty of conspiracy, the jurors relaxed in their scrutiny of the remaining charges. Second, it it wrong to speak of conspiracy as "independent" of the substantive charges which the Government claimed were *pursuant to the conspiracy.* Third, the court's conclusion that jury compromise is more likely to occur where a defendant is charged with several grades of offenses than where there are a number of technically distinct charges is without empirical basis or support in common sense. The jury in *Price* had only three charges on which to negotiate trade-offs; petitioner's jury had six. Finally, and itself fatal to the court's conclusion, there was no suggestion in *Price* that the evidence was weak, the case was close, or the jury divided. This Court declined to get into such details, reversing regardless. Here, there was indisputable evidence of jury confusion, compromise, or both, since the jury found petitioner *not guilty* (of three counts) on evidence indistinguishable from the evidence upon which it convicted him. The Government's case against petitioner consisted of the testimony of Barry Lipsky who claimed to have made drug deliveries for petitioner on five occasions. The jury believed Lipsky thrice (on the conspiracy count and two substantive counts), disbelieved him thrice. Compromise or confusion is a virtual certainty, not seriously disputed by the Government below, yet the court inexplicably credited the jury with "discriminating acquittal" (13a) which it found to *bely* the possibility of confusion or compromise. This is, at best, blatant nonsense.

2. *The petition presents an important issue under the Double Jeopardy Clause.*

If the decision below stands, prosecutors will have virtual

carte blanche to violate a defendant's double jeopardy rights. They can try him for a crime, charge him again with the same crime and join it with new charge, and there will be no remedy. He can be "charged and . . . subjected to a second trial . . . an ordeal not to be viewed lightly," *Price v. Georgia, supra,* again and again. The prosecution can make use of the jeopardy-barred charge, again and again, to burden the accused's defense of other charges. The defendant can get no relief unless he can *prove* the impossible, that the constitutional violation *caused* his conviction on the other charges.

As the Second Circuit itself has noted, the double jeopardy clause is not fully vindicated by reversing a jeopardy-barred conviction. To give the defendant no more relief than that is "to deny to a large degree the protection which the right was meant to afford him." *United States v. Alessi,* 536 F.2d 978, 980 (2d Cir. 1976). Yet that is what was done to petitioner.

Petitioner submits that a proper construction of the double jeopardy clause is that it requires vacation of any and all convictions obtained during a trial in which the accused's right against double jeopardy is violated. He submits that such was the holding of the Court in *Price v. Georgia,* and that any doubt on the matter should be put to rest.

3. *The petition presents an appropriate occasion to clarify the meaning and limits of the harmless error doctrine.*

In *Holloway v. Arkansas,* 435 U.S. 475 (1978), this Court recognized that there are some kinds of constitutional deprivations which are not amenable to harmless error analysis; where the error is not discrete and isolatable but permeates the process; where a court would engage in "unguided speculation" in trying to assess the impact of the error on the outcome. In such a case "automatic" reversal is required. In *Holloway* it was con-

flicting representation. There are many others, *e.g.,* denial of counsel, *Argersinger v. Hamlin,* 407 U.S. 25 (1971), the right to consult with counsel during a recess, *Geders v. United States,* 425 U.S. 80 (1976), the right to make a summation, *Herring v. New York,* 422 U.S. 853 (1975), to defend *pro se, Faretta v. California,* 422 U.S. 806 (1975). Surely, the deprivation below is in that category. As Mr. Justice Marshall said in a similar case (defendant impliedly acquitted of first degree murder, tried twice more, convicted of second degree) when he sat on the Second Circuit:

> The ends of justice would not be served by requiring a factual determination that the accused was actually prejudiced in his third trial by being prosecuted for and charged with first degree murder, nor would the ends of justice be served by insisting upon a quantitative measurement of that prejudice. The energies and resources consumed by such inquiry would be staggering and the attainable level of certainty most unsatisfactory. There could never be any certainty as to whether the jury was actually influenced by the unconstitutionally broad scope of the reprosecution or whether the accused's defense strategy was impaired by this scope of the charge, even if there were a most sensitive examination of the entire trial record and a most suspect and controversial inquest of the jurors still alive and available. *United States ex rel Hetenyi v. Wilkins,* 348 F.2d 844, 864 (2d Cir. 1965), *cert. denied,* 383 U.S. 913 (1966).

In any event, it is clear that *Chapman v. California,* 386 U.S. 18, 24 (1967), and *Harrison v. United States,* 329 U.S. 219, 225 (1968), require that the convictions be vacated unless the Government can prove the absence of prejudice. This it did not even purport to do. The Court below placed the burden on defendant and thus vitiated his constitutional rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 96—August Term, 1978.

(Argued September 12, 1978 Decided December 5, 1978.)

Docket No. 78-2064

VINCENT PACELLI, JR.,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

Before:

SMITH, FEINBERG and MANSFIELD,
Circuit Judges.

Appeal from order in the United States District Court for the Southern District of New York, Milton Pollack, *Judge,* denying motion to vacate sentence under 28 U.S.C. §2255. Affirmed.

STEVEN B. DUKE, New Haven, Conn., *for Appellant.*

JAMES P. LAVIN, Assistant U.S. Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Audrey Strauss and Robert J. Jossen, Assistant U.S. Attorneys, of counsel), *for Appellee.*

SMITH, *Circuit Judge*:

This is an appeal from a denial of a motion to vacate sentence in the Southern District of New York, Milton Pollack, *Judge.* Petitioner is currently serving a sentence[1] for violations of federal narcotics laws. The motion to vacate the sentence and convictions was filed pursuant to 28 U.S.C. §2255.[2] For reasons somewhat different from those of the district court, we affirm.

In December, 1973 petitioner Pacelli was tried before Judge Pollack and a jury on seven counts of violating federal narcotics laws, 21 U.S.C. §§812, 841 and 846, along with four co-defendants. These charges included one count of conspiracy to distribute narcotics and six counts of distributing narcotics. The events and actions which formed the basis of the charges will not be discussed in detail here.[3] Suffice it to say at this point that

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[1] Pacelli is currently serving a 20-year sentence in connection with a previous narcotics violation. The sentences imposed for the convictions challenged here were two 15-year sentences to run concurrently. Upon completion of that term, Pacelli will serve a life sentence for a murder conviction.

[2] 28 U.S.C. §2255 provides in part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.

[3] The facts are fully laid out in the direct appeal on these charges, *United States v. Mallah,* 503 F.2d 971 (2d Cir. 1974), *cert. denied,* 420 U.S. 995 (1975), and in related cases, *United States v. Pacelli,* 521 F.2d 135 (2d Cir. 1975), *cert. denied,* 424 U.S. 911 (1976) and *United States v. Pacelli,* 470 F.2d 67 (2d Cir 1972), *cert. denied,* 410 U.S. 983 (1973).

the charges involved widespread narcotics distribution operations involving at least twelve persons, and related events included the murder of one potential prosecution witness.

Pacelli was convicted of the conspiracy count and two of the substantive counts. One count was dismissed by Judge Pollack during the trial, and the jury found Pacelli not guilty of the remaining three counts. On appeal of Pacelli's convictions in 1974, this court found that the conspiracy charge was barred by the double jeopardy clause of the fifth amendment. *United States v. Mallah,* 503 F.2d 971 (2d Cir. 1974), *cert. denied,* 420 U.S. 995 (1975), and accordingly reversed the conviction for conspiracy.[4] The convictions on the two substantive counts were affirmed. *Mallah, supra.*

In November, 1977 petitioner Pacelli filed a motion pursuant to 28 U.S.C. §2255 to vacate the convictions on the two substantive counts. The basis of this claim is that his convictions on the substantive narcotics charges were sufficiently tainted by the "spillover" effects of the double jeopardy-barred conspiracy charge to constitute a violation of his fifth amendment rights against being placed in double jeopardy. Pacelli did not raise the issue of "spillover" double jeopardy prohibitions against the substantive counts on direct appeal of the convictions, although the issue does appear to have been raised in his petition for certiorari to the United States Supreme Court.[5]

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[4] The double jeopardy claim on the conspiracy count stemmed from Pacelli's 1972 conviction on a narcotics conspiracy charge, involving a conspiracy from January 1-June 14, 1971. In Pacelli's 1973 trial, at issue here, the conspiracy charged was alleged to have covered the time from January 1, 1971-September 23, 1973. This court in *Mallah, supra,* 503 F.2d 971, found that the two conspiracy charges did in fact overlap, and that the government had not met its burden of showing that the conspiracies were not the same.

[5] In Pacelli's petition for certiorari, he raised and discussed the question of "[w]hether simultaneously trying and submitting to the jury

Judge Pollack denied the motion ot vacate the convictions on the grounds that no constitutional issue was raised, and therefore no claim under §2255 was set forth. Additionally, Judge Pollack found that the failure to raise the "spillover" issue on direct appeal constituted an "impermissible by-pass" of normal appellate procedures and thus was a waiver of petitioner's double jeopardy claims here. Finally, Judge Pollack found that claims of prejudice resulting from the joinder of the barred conspiracy charge with the substantive charges were "specious," since joinder of defendants and charges would have been allowed under Rule 8 of the Federal Rules of Criminal Procedure and substantially the same evidence submitted would have been admissible, even absent the conspiracy charge. While we do not agree with Judge Pollack that no constitutional issue was raised or that the constitutional claim was waived, we agree that there was no showing of prejudice, and therefore affirm the denial of §2255 relief.

We turn first to an examination of the effects of Pacelli's failure to raise the "spillover" double jeopardy claims on direct review in terms of waiving those claims. Until recently, it appeared clear that a waiver of a constitutional right had to be "knowing," "intelligent," or "an intentional relinquishment or abandonment of a known right or privilege," *Fay v. Noia*, 372 U.S. 391, 439 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

In keeping with this "high waiver standard"* which refused to infer a waiver of constitutional rights without a strong showing of such a deliberate waiver, constitutional claims were cog-

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a jeopardy-barred conspiracy count and related substantive counts is a violation of the Double Jeopardy Clause with respect to *all* charges tried and submitted." (Emphasis in original.)

* See Cover and Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035 (1977).

nizable in motions under 18 U.S.C. §2255, often even when the claims were being raised for the first time in these §2255 motions. *Kaufman v. United States*, 394 U.S. 217 (1969); *United States v. Loschiavo*, 531 F.2d 659, 662-63 (2d Cir. 1976); *Randall v. United States*, 454 F.2d 1132 (5th Cir.), *cert. denied*, 409 U.S. 862 (1972). Thus, constitutional claims were deemed waived only on a showing of "deliberate by-pass" of regular appellate channels. *United States v. West*, 494 F.2d 1314 (2d Cir.), *cert. denied*, 419 U.S. 899 (1974).

On the other hand, a claim which was non-constitutional generally could not be raised on collateral review unless it alleged a "fundamental defect" resulting in "a complete miscarriage of justice," *Davis v. United States*, 417 U.S. 333, 345-46 (1974); *Sunal v. Large*, 332 U.S. 174 (1947), particularly where such an issue was not raised on direct appeal. *Stone v. Powell*, 428 U.S. 465, 477 n. 10 (1976); *United States v. Wright*, 524 F.2d 1100 (2d Cir. 1975).

In recent years, the Supreme Court has seen fit to narrow the grounds on which motions for collateral relief from criminal convictions can be granted by federal courts. In *Stone v. Powell*, *supra*, 428 U.S. 465, the Court held that a state prisoner could not be granted collateral relief in federal court where he had had a "full and fair" opportunity to litigate his fourth amendment claims in state court. In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Court rejected the *Fay v. Noia* test of "deliberate by-pass" as applied to a state prisoner who had not complied with a procedural rule requiring assertion of his fifth amendment claim prior to trial, holding that he was entitled to relief under 28 U.S.C. §2254† only upon a showing of cause as to

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† 28 U.S.C. §2254 provides for collateral review of state court convictions in federal court "on the ground that [petitioner] is in custody in violation of the Constitution or laws or treaties of the United States."

why he had not raised the issue before and actual prejudice resulting from the alleged constitutional error. This applied to the states a test set out for certain federal cases in *Davis v. United States*, 411 U.S. 233 (1973).[8] Courts have also inferred a tactical or strategic decision in the failure to raise some issues below, and have bound defendants to these "tactical" decisions of counsel by refusing collateral relief. *Estelle v. Williams*, 425 U.S. 501 (1976); *United States v. West, supra*, 494 F.2d at 1315.

The standard by which to judge a possible waiver by Pacelli in his failure to raise "spillover" double jeopardy claims on

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[8] *Davis* dealt with the effect of waiver rules set forth in Fed. R. Crim. P. 12(b) (2) which requires certain objections to be raised before trial on the waiver standards of *Fay v. Noia*, 372 U.S. 391 (1963), and *Kaufman v. United States*, 394 U.S. 217 (1969). The Court found that the statutory waiver rules were controlling, absent a showing of "cause" as to failure to raise the objection earlier and "prejudice" resulting from the error claimed.

Since the *Davis* test of cause and prejudice rests on a statutory construction, it does not dispose of the case here. Rule 12(b)(2) specifically requires that "defenses and objections based on defects in the indictment or information" be raised by pre-trial motion, and Rule 12(f) provides that failure to do so constitutes a waiver. The Notes of the Advisory Committee on Rules makes clear that objections to the "selection or organization of the grand jury," the objection in *Davis*, are covered by the waiver provision.

Issues relating to double jeopardy, on the other hand, are specifically listed in the discussion of objections which *may* be raised by pre-trial motion, but are not required to be raised so. Thus, failure to raise a claim of former jeopardy before trial does not constitute a waiver under Rule 12(b), and is not controlled by the *Davis* test.

In *Davis*, 411 U.S. at 239-40, the Court distinguished the situation in which no statutory waiver provisions were present, noting that

> [T]he court in *Kaufman* was not dealing with the sort of express waiver provision contained in Rule 12(b)(2) which specifically provides for the waiver of a particular kind of constitutional claim if it be not timely asserted.

As in *Kaufman*, then, the claims of double jeopardy here are not controlled by statutory waiver provisions, and thus not subject to the cause and prejudice test.

direct review may turn, then, on whether his claim is "constitutional." If his claim is not a constitutional one, then his faliure to raise it earlier may preclude collateral relief. *Stone v. Powell, supra*, 428 U.S. at 477 n. 19; *Kaufman v. United States, supra*, 394 U.S. at 220 n. 3; *United States v. Wright, supra*, 524 F.2d 1100. If the claim is a constitutional one, then a higher standard of waiver will apply.[9] We are of the belief that petitioner's claim based on the spillover effects of the double jeopardy-barred charge is a constitutional claim and the higher standard applies.

The government contends here that any prejudice which results from the joinder of a jeopardy-barred conspiracy charge with other substantive charges is a mere "evidentiary error" not of constitutional proportions, citing *Benton v. Maryland*, 395 U.S. 784, 798 (1969).[10] While *Benton* does not clarify what is meant by characterizing the prejudicial spillover effects as "evidentiary," there is no indication that such a characterization was

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[9] Though *Stone* and *Wainright* have found lower standards of waiver than the "deliberate by-pass" test of *Fay*, neither case disposes of the issue here. *Stone* specifically limits its holding denying collateral relief where there has been opportunity for a full and fair hearing below to fourth amendment exclusionary claims, and discounts the fear of general revision of habeas corpus doctrine exhibited by the dissenting justices, noting that "[o]ur decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally." 428 U.S. at 495, n. 37. (Emphasis in original.)

Similarly, *Wainright* applies the *Davis* test of cause and prejudice (see note 8) to a state contemporaneous objection rule. The procedural considerations of requiring adherence to a specific statutory provision at issue there are not applicable to the double jeopardy claim here.

[10] It is not obvious on the face of the record that the burglary conviction was affected by the double jeopardy violation. To determine whether there is in fact any such evidentiary error, we would have to . . . examine the record in detail. [*Benton v. Maryland*, 395 U.S. 784, 798 (1969)].

intended to preclude the notion that the errors involved were of a constitutional nature.[11]

Additionally, the decisions in *Price v. Georgia,* 398 U.S. 323 (1970) and *United States ex rel. Hetenyi v. Wilkins,* 348 F.2d 844 (2d Cir. 1965), *cert. denied,* 383 U.S. 913 (1966), though distinguishable on their facts from this case,[12] suggest that the possibility of a jeopardy-barred charge with a permissible one *is* a problem of constitutional dimensions.[13] The fact that the jury in this case was given a *Pinkerton*[14] instruction which tied the barred conspiracy charge to the substantive counts on which Pacelli was convicted[15] establishes the possibility of spillover

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[11] The use of "evidentiary" could simply be a reference to the admission of prejudicial evidence in violation of constitutional rights. The Court did remand the issue ot determine the existence of "spillover" prejudice, indicating that some claim of prejudice was cognizable. *Benton v. Maryland, supra,* 395 U.S. at 798.

[12] Both cases involve the joinder of lesser-included offenses with greater ones stemming from the same transaction. See pp. 549-551, *infra.*

[13] See *Price v. Georgia,* 398 U.S. 323, 331 (1970): Second conviction on lesser charge is not "harmless error" because "[t]he Double Jeopardy Clause . . . is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict." Also, see *United States ex rel, Hetenyi v. Wilkins,* 349 F.2d 844, 864 (2d Cir. 1965), *cert. denied,* 383 U.S. 913 (1966): "Both the existence of this possibility of prejudice and the fact that it arises from a violation of the accused's constitutional rights render the process which resulted in his detention constitutionally inadequate, less than that which is constitutionally due."

[14] *Pinkerton v. United States,* 328 U.S. 640 (1946).

[15] Judge Pollack charged the jury:

> I have now reviewed the elements of the substantive counts which the Government must prove beyond a reasonable doubt before you may find that the defendant is guilty on those counts. There is furthermore another method by which you should evaluate the evidence and which would sustain the guilt on the substantive counts of the defendant charged even though the Government's proof thereon was not sufficient to establish all the required elements to him.

prejudice sufficient to raise a constitutional claim under *Price* and *Hetenyi.*

Even though Pacelli's claim does raise a constitutional issue, it would still be possible to find a waiver of that constitutional claim based on delay or by-pass. Though the doctrine of laches is not specifically applicable to motions under §2255,[16] delays and failure to raise issues can be taken into account by a court ruling on a motion for collateral relief.[17]

Pacelli's failure to raise the issue of "spillover" double jeopardy claims on direct appeal or in a petition for rehearing is

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> You will recall the instructions I have given you as to the crime of conspiracy charged in the first count. If you find pursuant to those instructions that a particular defendant was a conspirator, and hence guilty under the first count, you may find him guilty as well under a substantive count in the indictment, providing you find that the crime charged in the substantive count was committed, and that it was committed during and in furtherance of the conspiracy charged in the first count.
>
> If he is a member of a conspiracy, just like a partner he is criminally responsible for the substantive crime, and may be found guilty thereof.
>
> The reason for this is that his co-conspirator committing the substantive crime is the agent of the other members of the alleged conspiracy.

[16] See *Heflin v. United States,* 358 U.S. 415, 420 (1959) (Stewart, J., concurring); *Conners v. United States,* 431 F.2d 1207 (9th Cir. 1970).

[17] Rule 9(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts provides:

> A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.

Additionally, in *Kaufman, supra,* 394 U.S. at 220, n. 3, there is the suggestion that failure to take a direct appeal does not rob the reviewing court of the power to rule on constitutional claims, but may allow the court to refuse to do so in "appropriate" cases.

troubling. We do not give much credence to petitioner's contention that he did not have to raise such an issue because it was purely one of "remedy" for the court to deal with after it found the conspiracy charge to be barred.[18] There is an initial temptation then to square this case with *United States v. West, supra,* 494 F.2d 1314, in which this court found that a failure to raise a fourth amendment claim at trial or on direct appeal constituted a "deliberate by-pass" of avenues of review, and thus a waiver of the claims.

Still, there is enough on the record here to find that there was no deliberate waiver of constitutional claims by petitioner. First, the court in *West* intimated some "trial strategy" advantage in failing to object to certain evidence at trial. *United States v. West, supra,* 494 F.2d at 1315. We can see no apparent strategic advantage here in failing to press a double jeopardy claim. In addition, it is conceded by both parties that the present issue of "spillover" prejudice was raised in petitioner's application for certiorari to the Supreme Court, and thus is not being raised for the first time in these proceedings on the §2255 motion. Consequently, we do not believe that petitioner has waived his rights to raise double jeopardy claims.

The next step, then, is to determine the standard by which petitioner's claim of prejudicial error should be evaluated. Since we have found that petitioner has raised a claim for constitutional dimensions, the proper standard for review is that set forth in *Chapman v. California,* 386 U.S. 18, 24 (1967):

> [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

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[18] Petitioner contends that he was not obligated to raise the issue of "spillover" prejudice specifically below, since the issue concerned merely the extent of relief to be granted by the court when it found that one of the counts was jeopardy barred.

According to this standard, the beneficiary of the alleged error, in this case the government, has the burden to show that the error was harmless beyond a reasonable doubt. *Harrison v. United States,* 392 U.S. 219, 225 (1968); *Chapman v. California, supra,* 386 U.S. 18.

Petitioner argues that a "per se" rule of reversal is required whenever there exists a possibility of prejudice from the improper joinder of a jeopardy-barred offense with other charges. Petitioner points to *Price, supra,* 398 U.S. 323, where a reprosecution on a murder charge was barred following an earlier murder trial in which defendant had been convicted of manslaughter. Though defendant was again convicted only of manslaughter in his second trial, the Court held that the trial on the greater charge was still barred by the double jeopardy clause:

> The Double Jeopardy Clause, as we have noted, is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. [398 U.S. at 331.]

Thus, no showing of actual prejudice to the defendant was required.

Similarly, in *Hetenyi,* a third trial on first degree murder charges was found to be prohibited by the double jeopardy clause following a conviction in the first trial on second degree murder, even though the later trial only resulted in a conviction of second degree murder. This court held that

> [t]he question is not whether the accused was actually prejudiced, but whether there is *reasonable possibility* that he was prejudiced. (Emphasis in original) [348 F.2d at 864]

We decline to find, however, that these cases established a "per se" rule requiring automatic reversal of any conviction on a charge joined with a jeopardy-barred charge.

There is a significant difference in the offenses involved in *Price* and *Hetenyi* and those involved in the present case. In *Price* and *Hetenyi*, the issue was retrial on an offense following conviction of a lesser-included offense. The Court in both cases saw possible prejudice to defendant from the jury's consideration of a greater offense on retrial. In *Price*, 398 U.S. at 331, the Court noted that the inclusion of the murder charge might have "induced the jury to find [the defendant] guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence." And in *Hetenyi*, 348 F.2d at 866, this court pointed out that

> it is entirely possible that without the inclusion of the first degree murder charge, the jury, reflecting a not unfamiliar desire to compromise, might have returned a guilty verdict on the first degree manslaughter charge on the same evidence.

This concern over jury compromise is not as well warranted in a case like the present one in which the joinder of charges does not involve a lesser-included alternative offense with a greater one, but involves independent offenses of conspiracy and substantive charges. Additionally, neither *Price* nor *Hetenyi* speaks of a "per se" rule, but only considers the possible prejudicial effects of the joinder of barred charges with lesser-included offenses. In keeping with the notion that no reversal is required per se, the Court in *Benton v. Maryland, supra*, 395 U.S. 784, 798, did not automatically reverse a burglary conviction stemming from a retrial of a burglary and jeopardy-barred larceny charge, but remanded the case to the state court to determine if "spillover" prejudice was present.

Since there is no requirement of automatic reversal of Pacelli's substantive narcotics convictions, then, we must determine whether any error was harmless beyond a reasonable doubt. *Harrington v. California*, 395 U.S. 250 (1969); *Chapman v. California, supra*, 386 U.S. 18. We find that this standard has been met.

Petitioner claims that he was severely prejudiced in his trial on all counts because of the joinder of the substantive counts with the barred conspiracy count. He argues that his defensive energies were dissipated by the need to devote so much time and effort to evidentiary and other issues raised by the conspiracy count, particularly the prejudicial evidence of drug transactions by co-defendants. Pacelli also contends that the submission of the conspiracy count tended to confuse the jury. We do not agree.

Since the testimony of those government witnesses who testified with respect to the conspiracy count also related to the substantive counts, the elimination of the conspiracy count would not have significantly altered the defense trial strategy, which was aimed at discrediting these witnesses. Moreover, the fact that the conspiracy count did not confuse the jury or preclude it from properly sifting through and evaluating the evidence with respect to the substantive counts is attested to by the jury's discriminating acquittal of Pacelli on three of the latter counts.

Pacelli also admits that rejoinder with certain defendants would have been permitted because of charges of joint partiicipation in substantive crimes with them.[19] It is also the case, as noted by the district court, that evidence concerning joint

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[19] *E.g.*, Pacelli could have been tried with co-defendant Alfred Catino on Count Two of possession and distribution of heroin, and with co-defendant Benjamin Mallah on Count Six of distribution of heroin.

action is admissible in separate as well as joint trials even without a formal conspiracy charge. *United States v. Granello*, 365 F.2d 990, 995 (2d Cir. 1966), *cert. denied*, 386 U.S. 1019 (1967). Similarly, there is no right to automatic dismissal of substantive counts following dismissal of a conspiracy count. *United States v. Variano*, 550 F.2d 1330 (2d Cir.), *cert. denied*, 434 U.S. 892 (1977).[20]

Evidence of barred crimes, particularly where conviction was had, may be used for some purposes, *e.g.*, subsequent offender crimes, *Gryger v. Burke*, 334 U.S. 728 (1948), or to show similarity of method or intent. Fed. R. Evid. 404. Moreover, an agreement — even it not itself subject to a criminal charge — may establish an agency relationship and thus warrant introduction of evidence involving confederates. *United States v. Olweiss*, 138 F.2d 798, 800 (2d Cir. 1943). One may not be convicted twice for entering into the same illegal agreement. Evidence of actions by partners in the illegal agreement may be

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[20] An indictment need not charge defendants with a conspiracy in order to permit joinder under Rule 8(b). *United States v. Russo*, 480 F.2d 1228, 1237 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974); *United States v. Scott*, 413 F.2d 932, 934 (7th Cir. 1969), *cert. denied*, 396 U.S. 1006 (1970); *United States v. Granello*, 365 F.2d 990 (2d Cir. 1966), *cert. denied*, 386 U.S. 1019 (1967). What is necessary is that the defendants are "alleged" to have participated in the same illegal act or series of acts. Pacelli argues that no such allegation was made here because the indictment did not aver that the substantive offenses were acts pursuant to the conspiracy. Such formality is not required. If defendants can be joined without a conspiracy charge, *a fortiori*, they can be joined without an express allegation that the offenses were part of a series of illegal acts. If the necessary linkage could not be inferred from the face of the indictment, it was certainly established by the evidence presented at trial. Thus joinder was permitted under Rule 8(b). Moreover, since Pacelli was named as a defendant in all but one of the substantive counts and since the evidence bearing on these counts necessarily included a great deal of evidence establishing the existence of a conspiracy among the defendants, we cannot say that Pacelli would have been entitled to severance of his trial under Rule 14, even if no conspiracy count had been brought.

admissible, however, to prove separate substantive offenses not known or charged earlier.

The acts charged in the substantive counts on which Pacelli was convicted were not known to the government at the time of his first conspiracy indictment. While the substantive acts were carried out in accordance with the single conspiracy, they are distinct crimes, and the *Pinkerton* rationale makes all partners in the enterprise responsible for the acts of the others in carrying it out, whether a conspiracy is charged or not.[21] Thus, Pacelli was not substantially prejudiced by the joinder of the distinct substantive offenses with the conspiracy charge.

The district court's order is affirmed.

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[21] *Pinkerton v. United States, supra*, 328 U.S. at 647:
[I]n the law of conspiracy . . . the overt act of one partner in crime is attributable to all. . . . [W]e fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense.

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of December, one thousand nine hundred and seventy eight.

Present:

HON. J. JOSEPH SMITH
HON. WILFRED FEINBERG
HON. WALTER R. MANSFIELD
Circuit Judges.

VINCENT PACELLI, JR.,	)	
Petitioner-Appellant,	)	
v.	)	78-2064
UNITED STATES OF AMERICA,	)	
Respondent-Appellee.	)	

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk
By: ARTHUR HELLER,
Deputy Clerk

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in theCity of New York, on the 28th day of December, one thousand nine hundred and seventy-eight.

Present:

HON. J. JOSEPH SMITH,
HON. WILFRED FEINBERG,
HON. WALTER R. MANSFIELD,
Circuit Judges.

VINCENT PACELLI, JR.,	)	
Petitioner-Appellant,	)	
v.	)	Docket No. 78-2064
UNITED STATES OF AMERICA,	)	
Respondent-Appellee.	)	

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk